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In the

Supreme Court of the United States

OCTOBER TERM, 1977
NOS. 77-25, 77-37, 77-42

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.

Petitioners,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

and

AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all other similarly situated,

Respondents,

and

WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents in Support of Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MOTION OF THE NEW YORK STATE CONSUMER PROTECTION BOARD FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND THE BRIEF AMICUS CURIAE

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MOTION OF THE NEW YORK STATE CONSUMER PROTECTION BOARD FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Pursuant to Rule 42 of the Rules of the Supreme Court, the New York State Consumer Protection Board (hereinafter,

the Board) respectfully moves for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the respondents has been obtained. However, the attorneys for the petitioners refuse to consent to the filing of the brief by the Board as *amicus curiae*.

The New York State Consumer Protection Board as part of the Executive Department of the State of New York is mandated to coordinate and perform a wide range of consumer protection functions for the consumers of the State of New York. The Board has the power and duty, *inter alia*, to conduct investigations, research, studies and analyses of matters affecting the interests of consumers; to represent the interest of consumers of the state before federal, state and local administrative and regulatory agencies; to study the operation of consumer protection laws and to recommend to the Governor laws for the protection of consumers; and to cooperate with and assist consumers in class actions. (N.Y. Exec. L. §553).

The Board as the representative of New York consumers offers a perspective which is not otherwise available to this Court. Since 1970, when created by the New York Legislature, the Board has developed considerable expertise in the problems arising from creditor-debtor relationships. The Board has drafted comprehensive legislation to modify a number of laws regulating credit in New York State, testified at legislative hearings on creditor-debtor problems, and produced several pamphlets and movies on the subject.

The Board also assisted the plaintiffs and filed a brief as *amicus curiae* in *Juidice v. Vail*, 97 S. Ct. 1211 (1977) which involved the constitutionality of the New York contempt statute when used to collect consumer debts. This Court granted the Board's motion for leave to file a brief as *amicus curiae* even though the New York Attorney General, who represented the opposing party, refused to consent to the filing of the brief. *Judice v. Vail*, 97 S. Ct. 251 (1976).

The consumers of New York State are faced with the question in this case whether owners of consumer goods are constitutionally protected from warehousemen permanently disposing of their goods by selling them without an opportunity for a hearing. The Board submits that the constitu-

tionality of U.C.C. §7-210 which, authorizes warehousemen to enforce their liens by selling stored property, must be examined with an understanding of the abuses by warehousemen that have been fostered by this procedure. Only with an understanding of the context of this case can this Court fully comprehend the implications of its decision. The Board is in a unique position as the New York State consumer agency to draw from its practical experiences and expertise to provide this background for the Court.

We, therefore, submit that the Board has a significant interest in the case before this Court, and experience with the issues in this case which enable it to present a brief *amicus curiae* which will aid the Court in its deliberations.

Respectfully submitted,

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Consumer Protection Board

I. INTRODUCTION

The legal issue raised in this case is whether the enforcement of the warehouseman's lien pursuant to N.Y. U.C.C. §7-210 constitute action under color of state law in violation of 42 USC §1983 and state action under the due process clause of the 14th Amendment.

For owners of personal property and household goods, this issue translates more concretely into the question whether owners of consumer goods are constitutionally protected from warehousemen permanently disposing of their goods by selling them without an opportunity for a hearing.[1] The warehouseman's authority to sell the property in this case is exclusively derived from U.C.C. §7-210, and not from a contract with an owner who voluntarily placed the property in the possession of the warehouseman.

The Court of Appeals captured the meaning and impact of the sale provisions of the statutory warehouseman lien when Judge Frederick Van Pelt Bryan, for the majority, stated that:

> Were it not for this statute, the warehouseman would stand in the position of any other creditor, i.e., he would have to have the debt he claims he is owed judically established, and then have the sheriff execute upon the goods which he concedely has the common law right to hold as security . . . *It permits a complete circumvention of the judicial process, by installing the warehouseman as the final and interested judge of any disputes over storage charges, and as the sheriff who will enforce his own decisions* . . . (emphasis added) *Brooks v. Flagg Bros.*, 553 F. 2d 764 (2nd Cir. 1977)

The statutory circumvention of the judicial process has caused owners of personal property and household furnishings anguish, extraordinary expense and inconvenience throughout the State of New York. Therefore, the New York State Consumer Protection Board wants to offer this Court a factual

[1]The issue is not whether the warehouseman should be paid, but whether the drastic remedy of foreclosure without an opportunity for a hearing is constitutionally permissible in view of the warehouseman's right to a possessory lien and his access to other remedies. See, *Parks v. Mr. Ford*, 556 F. 2d 132, 162 (3rd Cir. 1977) (Gibbons, J) (concurring).

and legal backdrop against which to decide the legal questions raised in this case by discussing cases in New York that reveal the extent of problems caused by warehousemen and by analyzing the consequences of an affirmation or reversal by this Court.

The only authority to enforce the warehouseman's lien is found in U.C.C. §7-210 where the New York Legislature established procedures for foreclosing on the lien. U.C.C. §7-210 requires that all persons known to claim an interest in the goods be notified of the forthcoming sale. Once complied with, New York law authorizes the warehouseman to sell the stored property and to use the proceeds of the sale to satisfy his lien. The statutory procedure does not require any opportunity for a hearing prior to nor subsequent to the sale, but rather limits the warehouseman's responsibility to mere notice of a prospective sale. In short, as expressed in *Brooks:*

> The warehouseman, unquestionably an interested party, is thus authorized by law to resolve any disputes over storage charges finally and unilaterally. *Brooks v. Flagg Brothers, supra* at 771.

II. THE LEGISLATURE'S FAILURE TO PROVIDE OWNERS OF PROPERTY AN OPPORTUNITY FOR A HEARING PRIOR TO SALE IS ABUSED BY WAREHOUSEMEN

Because of the statutory protections provided warehousemen by U.C.C. §7-210, warehousemen have retained property and threatened to sell or sold property with impunity in spite of objections and disputes raised by owners of properties.

Stephen Mindell, Chief of the Frauds Division in the New York State Attorney General's office concluded that:

> It's unregulated piracy. Our office is bombarded with complaints each year, but there is little we or anybody can do because storage is a completely unregulated industry.

> They give the consumer a bill with a number of charges they never disclosed before, and if the consumer dares to question or challenges them they threaten to and sometimes sell his goods at auction. NY Times, August 22, 1976, p. 1 Col. 5 and p. 36 Cols. 3-8.

Although no one has conducted a comprehensive survey of the pervasiveness of this problem, it is instructive to review the warehousemen cases which have reached the courts in New York State. Unfortunately, this review is limited to those owners of stored property with access to counsel who brought suit. These cases illustrate the problems caused by the U.C.C. statutory procedures that authorize the sale of stored property without any judicial monitoring or scrutiny.

In *Weinstein v. Santini Transfer Co. Inc.*, 155 Misc. 139 (City Ct. NY, Bronx Cty, 1935), the Court recognized that:

> It is a matter of common knowledge that a great many sales are conducted by warehousemen and others in a similar [bad faith] manner and that advantage is thus taken of the needy and helpless who might be incapable of protecting themselves. *Id.* at 142.

In *Knox v. DeCarolis Moving and Carting Co.*, No. 8941/75 (Sup. Ct. County of Monroe, 1975), *Jones v. Banner Moving and Storage Inc.*, 28 Misc. 2d 762 (N.Y. Sup. Ct. 1974), *mod.* 48 App. Div. 2d 928 (2nd Dept. 1974), and *Almond v. Best Movers, Inc.* No. 279/77 (Sup. Ct. County of Richmond, 1977), the plaintiffs were evicted from their homes and in their absence, their furniture and household possessions were removed by an agent of the defendant moving and storage company, who accompanied a marshal. In each case, the plaintiffs alleged that no warehouse receipt was issued, that there was no contractual agreement with the defendant and that there was no explanation nor notice within a reasonable time of storage fees. In spite of these disputes, the plaintiffs were threatened with sale of their stored property.[2] Moreover,

[2]See also, *Svendsen v. Smith's Moving and Trucking Co.*, (S.D.N.Y. 77 Civ. 2863, 1977), where even though the plaintiff was present when her property was removed, she still alleged that she never authorized the defendant to remove or store her property and that she was not advised of the rate of storage until she received a bill two months later. The warehouseman not only threatened to sell the property but eventually sold the goods.

in *Almond* the defendant did not even know that the plaintiff owned the property when the plaintiff tried to get her property back.

Furthermore, in *Knox v. DeCarolis Moving and Carting Co., supra,* before agreeing to any charges for storage, one of the plaintiffs inspected the stored property and discovered that the property was damaged and some pieces of furniture missing. Only after the commencement of a lawsuit and the issuance of a preliminary injunction was the dispute settled.

In another case, *Magro v. Lentini Bros. Moving and Storage Co.*, 338 F. Supp. 464 (S.D.N.Y.), *aff'd*, 410F. 2d 1064 (2nd Cir. 1971), *cert. denied*, 406 U.S. 91 (1972), the plaintiff alleged that the defendant fraudulently induced the plaintiff to sign a blank storage contract while plaintiff was under duress and charged plaintiffs false and fraudulent rates for services rendered. It was undisputed that a copy of the contract signed by plaintiff setting forth the terms for moving and storage was not sent until over two months after the goods had been stored.

Finally, the facts in the instant case further illustrate warehousemen's abuses. At the time of eviction, the marshal told plaintiff Brooks that the defendant-warehouseman accompanying him would store her property even though plaintiff Brooks wanted to call someone else. The defendant-warehouseman told plaintiff that the storage would cost $65 per month, and only after gaining possession of the property did he disclose a number of hidden charges. A series of disputes over charges subsequently took place, resulting in the warehouseman serving on the plaintiff Brooks a "final notice" to either pay the vigorously contested storage charges or have the property sold at public auction.

Furthermore, plaintiff Jones in this case denies ever authorizing the defendant-warehouseman who accompanied the marshal to store her goods and claims she was never advised of the storage rates.

The serious disputes and complicated situations described

above would be minimized if not altogether avoided if the statutory sale procedures complied with basic principles of due process by providing an opportunity for a hearing. Because warehousemen have the legal authority to unilaterally decide the amounts owed for storage and to sell the property to satisfy these debts, warehousemen have little incentive to keep complete records, to properly store the property, or to try to clarify the obligations of the owner of the property. The requirement that the owner be given an opportunity for a hearing will provide an incentive for warehousemen to conduct their businesses in a more equitable and orderly fashion.

III. AFFIRMING THE COURT OF APPEALS STATE ACTION HOLDING WILL ACCOMMODATE BOTH THE INTERESTS OF OWNERS AND WAREHOUSEMEN WHILE A REVERSAL WILL LEAVE OWNERS UNPROTECTED FROM WAREHOUSEMEN'S ABUSES

A. *A constitutional prohibition barring warehousemen from selling stored consumer goods without an opportunity for a hearing would not leave New York warehousemen remediless.*

New York law provides warehousemen with several alternative procedures to protect their interests. First, pursuant to Section 7-209 of the U.C.C., a warehouseman is entitled to a possessory lien. The existence of this lien in combination with the owner's obvious interest in obtaining the return of his personal belongings and household furniture gives a warehouseman enormous leverage in collecting his debt. R. Brown, The Law of Personal Property pp. 588-589

(3rd ed. 1975). Secondly, even if the owner-debtor refuses, objects, or is unable to pay the warehouseman, the warehouseman can sue the consumer and enforce a judgment by levying upon the retained property. Moreover, in the majority of cases, the warehouseman would be able to accelerate the proceedings.[3] For example, collection attorneys efficiently collect debts through the use of default judgments and enforcement proceedings. See e.g., D. Caplovitz, Consumers in Trouble: A Study of Debtors in Default, p. 221 (1974) (Over 90% of collection actions end in default judgments).

Finally, if the warehouseman and owner want to expeditiously resolve their dispute, New York law provides several additional avenues specifically designed to promote speedy and informal proceedings, including Arbitration or Simplified Procedure For Court Determination.[4] While Arbitration and Simplified Procedure for Court Determination are generally utilized in a commercial or labor setting, there is no prohibition on their use in the instant context. See, H. Wachtell, New York Practice under the CPLR, pp. 475-476 (5th ed. 1976)

In addition to existing remedies, recent New York State legislative history demonstrates that the Legislature responds rapidly to create new summary proceedings whenever courts have raised serious questions concerning the validity of statutory creditor remedies. In *Sugar v. Curtis Circulation Co.*, 383 F. Supp. 643, (S.D.N.Y. 1975), *vacated, sub nom. Carey v. Sugar*, 425 U.S. 73 (1976), a three-judge Federal District Court declared the New York pre-judgment attach-

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[3]"For we deal here only with the right to an opportunity to be heard...And, of course, no hearing need be held unless the defendant, having received notice of his opportunity, takes advantage of it." *Hernandez v. European Auto Collision*, 487 F. 2d 378, 386 (2nd Cir. 1973) (Timbers, J) (concurring), quoting from *Fuentes v. Shevin*, 407 U.S. 67 at 92-92 n. 29. See, N.Y. CPLR §3215 — Default Judgments, N.Y. CPLR §3212 — Summary Judgments, and N.Y. Lien §207 — Warrant to Sieze Chattels.

[4]Article 75, N.Y. CPLR authorizes arbitration upon agreement of the parties. N.Y. CPLR §§3031-3037, authorize simplified court procedures to promote a hearing that is as simple and informal as circumstances will permit. H. Wachtell, *supra*, at 489; N.Y. CPLR 3035(a). Also see, N.Y. CPLR §§3218 — Judgment by Confession; N.Y. CPLR §3222 — Action on Submitted Facts.

ment statute unconstitutional because it failed to grant the defendant-debtor an immediate post-seizure hearing. On March 24, 1976, this Court vacated that decision and remanded the case with directions that the three-judge District Court abstain from a decision of the federal constitutional issues until the parties had an opportunity to obtain a construction of the New York law from the New York State courts. On March 1, 1977, based on the *Sugar* decisions, the New York State Office of Court Administration and the New York State Judicial Conference recommended amendment of the New York attachment statute "to assure the constitutionality and effectiveness of New York State's attachment procedures." Memoranda, Office of Court Administration, McKinney's Session Law News, Vol. 8(a), p. A-478, Sept. 1977. Both Houses of the Legislature passed the amendments which became law on August 11, 1977. McKinney's Session Laws of New York (L. 1977, Ch. 860).

More recently in response to a three-judge District Court ruling in *Vail v. Quinlan,* 406 F. Supp. 951 (S.D.N.Y. 1976), *vacated, sub nom. Judice v. Vail,* 97 S. Ct. 1211 (1977), that the New York contempt statutes were unconstitutional when applied against judgment debtors, the New York Legislature again responded rapidly to protect the needs of creditors. On January 7, 1976, the District Court rendered its decision. On February 24, 1976, a bill (New York State Assembly Bill 10139) to cure the constitutional deficiencies in the contempt statutes was introduced in the New York Assembly. On June 29, 1976, the proposed legislation passed both Houses of the New York State Legislature. However, the bill was recalled from the Governor, after this Court noted probable jurisdiction. Subsequent to this Court's abstention holding, the Legislature, as it had after *Sugar,* promptly amended the New York contempt statutes to comply with the holding of the District Court.[5] McKinney's Session Laws of New York (L. 1977, Ch. 437).

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[5]The New York State Legislature also amended the statutory creditor remedy for seizure of a chattel after the decision in *La Prease v. Raymond Furniture Co.,* 315 F. Supp. 716 (N.D.N.Y. 1970), which declared New York State's replevin statute unconstitutional.

Therefore, if this Court were to rule that foreclosure of the warehousemen's lien constitutes unconstitutional state action, the New York legislature would quickly enact a new summary process to protect the interests of warehousemen in the event that the remaining procedures are deemed inadequate.[6]

Furthermore, the interests of property owners would be protected by an affirmation of the state action decision and the constitutional requirement of an opportunity for a hearing. Owners would be able to obtain an impartial determination of the amount owed before being permanently deprived of his property. As the Court of Appeals emphasized:

> These cases [*Sniadach, Fuentes, Mitchell* and *Di-Chem*] stand at least for the proposition that while judicial inquiry may at times be postponed, an adequate judicial determination of liability must take place before any deprivation of property if due process requirements are to be satisfied. *Brooks v. Flagg Bros., supra,* at 771.

B. *A reversal of the Court of Appeals State Action holding would insulate a large range of creditor remedies from constitutional scrutiny and leave consumers without any effective remedies to protect their stored property.*

In a series of landmark cases,[7] this Court, by application of the due process clause of the Fourteenth Amendment, has accommodated and balanced the interests of creditors and debtors. It has done so by insisting that state authorized creditor remedies meet certain specified minimum requirements of notice and opportunity to be heard before property of debtors can be transformed into property of creditors. *Parks v.*

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[6]One potential solution would be for the Legislature to declare the sale of stored goods by warehousemen to be the subject of a special proceeding as was done in the area of wage assignments. N.Y. Personal Property Law §46(e). Special Proceedings are specifically designed to assure a speedy determination of issues. H. Wachtell, *supra,* at 459-462; N.Y. CPLR, Article III.

[7]*Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969), *Fuentes v. Shevin,* 407 U.S. 67 (1972), *Mitchell v. W.T. Grant Co.,* 416 U.S. 600 (1974), *North Georgia Finishing v. Di-Chem. Inc.,* 419 U.S. 601 (1975).

Mr. Ford, supra, at 149 (Gibbons, J) (concurring).

Respondents seek to avoid the minimum standards of due process recognized by this Court by denying state action. If no state action is involved when a warehouseman unilaterally determines the validity of an alleged obligation and forecloses on the owner's property, then a property owner would not be constitutionally entitled to notice or an opportunity to be heard. Consequently, a state legislature would have full latitude to eliminate even existing statutory protections, such as notice prior to the sale of stored property. In other words, the consequences of a no-state action holding by this Court would be to insulate a large range of creditor remedies from constitutional scrutiny. State legislatures, reputed for their responsiveness to special interests,[8] would be allowed to enact any summary procedures for lien enforcement they deem to be in the public interest without constitutional restraint.[9] *Parks v. Mr. Ford, supra,* at 149-150.

Furthermore, a reversal of the Court of Appeals will leave owners of stored property without an effective remedy to protect their property. The Attorney General relying on *Dininny v. Reavis,* 100 Misc. 316 (Sup. Ct. NY Co. 1915), *aff'd.* 178 App. Div. 922 (1st Dept. 1917), argues that the owner of property held by a warehouseman has "many remedies" to protect his property, such as instituting a suit for conversion, or for an injunction, or by bringing a proceeding to recover a chattel (N.Y. CPLR Article 71)[10] (Brief for Attorney General

[8]Warehousemen and other possessory lien holders constitute a special interest to which state legislatures are traditionally responsive. R. Brown, The Law of Personal Property, §13.1 p. 391. See generally Kroft, the Magic and Myth of the Big Lobbyists; Empire State Report Vol. 1, No. 8 pp. 116-127 (April, 1975).

[9]At least since the *Civil Rights Cases* 100U.S. 3(1883), this Court has stressed the importance of the Fourteenth Amendment as a protection against unconstitutional state legislation. *Id.* at 11, 13, 17 and 18. A no-state action holding will, in effect, authorize state legislatures to circumvent the constitutional protections for debtors established by this Court in the *Sniadach* line of cases. See, *Parks v. Mr. Ford, supra,* at 150 (Gibbons, J) (concurring).

[10]The Attorney General also relies on *Phillips v. Money,* 503 F. 2d 990, 994-995 (7th Cir. 1974), *cert. denied,* 420 U.S. 934. *Phillips,* in contrast to the instant case, dealth with a creditors possession rather than sale of a debtor's property. A sale of property is a final rather than a temporary deprivation of property, and accordingly subject to greater constitutional protection. See, *Hernandez v. European Auto Collision, supra,* at 385.

at 18-19). However, as Judge Timbers has recognized in the analagous context of garagemens' liens:

> The fact that the owner may institute a suit for damages or other appropriate relief does not, in the uneven situation normally included in enforcement of a lien, satisfy the requirements of due process. *Hernandez v. European Auto Collision, Inc., supra,* at 385.

See also, *Parks v. Mr. Ford, supra,* at 166. (Seitz, C.J., concurring in part and dissenting in part, stated: "The debtor-creditor world is turned upside down when the debtor cannot regain his property without . . . filing suit . . .")

A party seeking to deprive an owner of his personal property must generally insitute an action, obtain a judgment and proceed to execution. These procedures afford a property owner an opportunity for a hearing. The remedies proferred by the Attorney General, however, reverse this normal burden of instituting proceedings, as well as the burden of proof. Moreover, these remedies do not afford the property owner a realistic opportunity for a hearing before his property is sold.

A sale may occur as quickly as twenty-four days after the warehouseman serves the notice of sale, NY U.C.C. §7-210, and it is unlikely that a plenary action for conversion, an injunction, or an action to recover a chattel could be instituted and temporary relief obtained prior to sale. *Caesar v. Kiser,* 387 F. Supp. 645, 649 (M.D N.C. 1975). Moreover, "[a] preliminary injunction is an extraordinary provisional remedy to which a plaintiff is entitled only on a special showing." *Margolies v. Encounter,* 42 N.Y. 2d 475, 479 (1977). Temporary restraining orders and preliminary injunctions "are in the nature of extraordinary remedies and consequently do not provide the assurance that a hearing will be held before the permanent deprivation of property occurs." *Caesar v. Kiser, supra,* at 649. In addition, the posting of a bond is a prerequisite to obtaining either a preliminary injunction, N.Y. CPLR §6312; *Margolies v. Encounter, supra,* or an order of seizure, N.Y. CPLR §7102(b).

Moreover, in contrast to a commercial setting where a warehouseman and a merchant have contracted for the warehouseman's services in an arms-length negotiation,

respondents in the instant case are "uneducated, uninformed consumer[s] with little access to legal help and unfamiliar with legal procedures . . ."[11] *Hernandez v. European Auto Collision, supra,* at 381 n.1. (concurring opinion), quoting from *Fuentes v. Shevin, supra,* at 83 n. 13. In addition, there is no contract between respondents and Flagg Bros. upon which respondents might sue and recover. The remote possibility that an owner of personal property may bring a plenary action no more provides an adequate opportunity for a hearing in this case then in *Sniadach, Fuentes, Mitchell,* or *Di-Chem.*

IV. THE WAREHOUSEMAN'S STATUTORY AUTHORITY TO FORECLOSE ON A WAREHOUSEMAN'S LIEN CONSTITUTES STATE ACTION

The Court of Appeals, in this case set the framework for finding state action by stating that:

> Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance. *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722, 81 S. Ct. 856, 860, 6 L. Ed. 2d 45 (1961). The ultimate question to be resolved is "whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan*

[11]A Special Committee of the American Bar Association has documented the lack of access to legal services of the overwhelming majority of Americans. The Committee estimates that effective access to legal services is being denied to at least 70 percent of our population, which amounts to as many as 140,000,000 people. ABA Special Committee on Prepaid Legal Services, a primer of Legal Services (1974). Other responsible authorities suggest that the figure is substantially higher. See e.g., Tunney and Frank, "Federal Roles in Lawyer Reform." 27 Stan. L. Rev. 333, 343 and n. 36 (1975). Therefore, it ignores reality to argue that an owner of property has a theoretical right to initiate an action to recover his property. See also, *Bates v. State Bar of Arizona,* 97 S. Ct. 2691, 2705 (1977).

> *Edison Co.,* 419 U.S. 345, 351, (1974). *Brooks v. Flagg Bros., Inc.* 553 F. 2d 764, 769 (1977).

The respondent's brief carefully sifted through the facts and circumstances of this case to reveal that U.C.C. §7-210 delegates to warehousemen the traditional governmental functions of lien enforcement binding non-consensual dispute resolution and summary sales which without this specific legislative authorization, would be unlawful.

The New York State Consumer Protection Board agrees with and relies upon the respondent's analysis to demonstrate that the enforcement of the warehouseman's lien constitutes state action and concurs with the Court of Appeals in that:

> [t]he combination of New York's statutory delegation of distinctly governmental power to the warehouseman and its corresponding expansion of his common law remedies suffices to thrust the state's involvement in the challenged activity over the threshold of state action. *Brooks v. Flagg Bros., supra,* at p. 771.

V. CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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